

PAUL M. ROBINSON
Claimant

GOFF MOTORS/GEORGE-NIELSON MOTOR CO.
Respondent

**KANSAS AUTOMOBILE DEALER
WORK COMP FUND**
Insurance Carrier

The only issue before the Board is: Does K.S.A. 2012 Supp. 44-501(a)(1)(E) preclude claimant from being awarded any compensation?

FINDINGS OF FACT

Claimant is a sales consultant and has worked for respondent, a car dealership, for three years.

On November 16, 2012, claimant saw two coworkers, Roderick Baker, a new car sales manager/sales consultant, and Jeff Schnitker, a sales consultant, jokingly wrestle with each other. This was done in front of Donald Goertzen, the general sales manager. The action started by the door and came past Mr. Goertzen's desk and finished at the end of the conference room table in the showroom. Mr. Schnitker walked to where claimant was standing. Claimant testified that he jokingly bear hugged Mr. Schnitker, who walked a few steps away and said, "Okay, I give up, I give up." Claimant testified that he let Mr. Schnitker go and took maybe five or six steps when he heard somebody approaching from behind and he turned around. Claimant indicated Mr. Schnitker grabbed him, stuck his right leg out in front of him and proceeded to "crank" claimant's right leg over him three times.¹ Claimant felt a pop, his right leg gave out and he fell to the floor. According to claimant, Mr. Schnitker said, "That's what you get for messing with me."² Claimant testified it was his belief that Mr. Schnitker was angry and was trying to force claimant to the ground. When claimant got up, he experienced extreme pain and had difficulty walking. Claimant told Mr. Goertzen he was going to the hospital and called John Wentling, the general managing partner, and Patti Basham, the office manager, on the way. Claimant's right knee was swollen by the time he reached the hospital. He did not receive any treatment at the hospital.

Claimant testified that his injury occurred because a manager (presumably Mr. Baker) "instigated" or "started" the "whole thing."³ Without being questioned, claimant volunteered that horseplay commonly occurred at work and respondent had no policy or procedure concerning horseplay.

Claimant saw his own doctor on November 20, 2012. His doctor ordered an MRI, which showed a couple of tears and an upper tibia fracture. He was placed on sedentary duty and returned to work.

Claimant continued to follow-up with his doctor, but did not receive any additional treatment, as he was waiting to see if the claim would be covered. According to claimant, as of February 4, 2013, his doctor felt the MCL tear and fracture had healed and recommended he start weight bearing.

¹ Claimant's Depo. at 15. The mechanism of injury is not explained very well in the record.

² *Id.* at 38.

³ *Id.* at 16.

A few weeks after the accident, claimant developed a blood clot, which he attributed to the trauma from his accident. Claimant takes blood thinners. He walks with a limp and can not straighten his right leg.

Jeff Schnitker has worked for respondent for five years. He testified that on November 16, 2012, he was walking past claimant when claimant put him in a bear hug from behind. Mr. Schnitker indicated claimant hung on tightly and started thrusting his hips on him. He said, "Okay, let go," and tried to free himself by twisting and turning. Claimant would not let go, so Mr. Schnitker put his right leg behind claimant's right leg and leaned back. They both fell down. Mr. Schnitker got up and told claimant, "You mess with the bull, you get the horns." Claimant was saying, "Oh, my knee." Mr. Schnitker felt he had to defend himself and was proud that he had knocked down the guy who had been picking on him ever since he came to work for respondent. Mr. Schnitker testified he did not use a lot of force and was not trying to hurt claimant, who he views as a friend. Mr. Schnitker testified that claimant drove away and yelled obscenities and threats toward him.

Mr. Schnitker testified claimant did not let go of him, nor walk away prior to their fall to the ground. He specifically denied claimant's version of what occurred, namely that claimant let him go and walked away, only to be grabbed by Mr. Schnitker and taken to the ground. He denied that he and Mr. Baker were messing around before the incident.

Mr. Schnitker testified claimant previously had come up behind him and rubbed his nipples while Mr. Schnitker was on the telephone and would bear hug him or "butt slap" him. He indicated employees engaged in high fiving, chest bumping and butt patting, but no wrestling or anything that resulted in management involvement. He testified Mr. Baker was aware of these sorts of prior horseplay.

An incident description signed by Mr. Schnitker, Mr. Wentling and Kyle Tallent stated the following:

This statement was given to John Wentling, General Managing Partner on November 29, 2012 by Kyle Tallent and Jeff Schnitker.

John Wentling's statement is continued at the end of the statement.

Paul Robinson declined to give a statement.

Incident:

It happened on Friday, November 16, 2012 at 5:40pm

Dealership was closing down business for the day. Computers were being shut down and salespeople were anticipating the word from the sales manager, Donnie Goertzen, to begin picking up the keys from lock boxes on each car.

Kyle Tallent, our IT director, was sitting at the receptionist desk and witnessed the entire incident.

I would like to begin by saying that all of our salespeople are good friends and enjoy working and helping one another. There is no fighting or bickering between salesmen only healthy productive competition.

Jeff Schnitker, a salesperson, was walking around a car on the showroom floor when Paul Robinson, a salesperson, grabbed Jeff from behind in a bear hug, jokingly. Jeff struggled back and forth for a few moments telling Paul "Ok, I give up, Ok, I give up", Paul continued to bear hug Jeff. Jeff stepped with his right leg behind Paul's right leg and leaned back to throw him off balance, only trying to get released and in no way attempting to cause injury to Paul. They both fell to the showroom floor and as Jeff was getting up; Paul was holding his right knee in pain. Paul sat at his desk for a few minutes and then got into his car and drove away. While Paul was driving away, he called me, John Wentling, to ask what he should do because he thought he should go to the emergency room. He asked me what he should tell them and I told him to tell them the truth, just what had happened. I also instructed him to call Patti Basham, our office manager, to get advice on how to handle the claim at the emergency room.⁴

Roderick Baker has worked for respondent for nine years. He testified he is required to supervise on occasion. At the time of the incident, he was getting ready to go outside and gather keys from vehicles when Mr. Schnitker came through the door. He believes he may have jokingly poked Mr. Schnitker and told him it was time to gather keys. He soon heard a commotion down on the showroom, 50-60' away. He saw claimant come from behind and give Mr. Schnitker a reverse bear hug, then claimant and Mr. Schnitker were on the ground. He remembers claimant being mad and saying his knee hurt and Mr. Schnitker being upset and verbalizing that claimant should have let go of him. He indicated there was occasional physical contact between coworkers such as high fiving, slapping on the arm or shoulder tapping, but nothing like what happened to claimant. He did not believe there were any problems between claimant and Mr. Schnitker prior to the incident. Mr. Baker testified they were just "screwing around."⁵

Gary Creitzer, a sales consultant, has worked for respondent for two years. At the time of the incident, he was on the phone. When he turned around, he saw claimant limping out and heard him tell Mr. Goertzen that he was going to the hospital. Mr. Creitzer testified he has seen chest bumping, high fiving, stomach tickling and even light bear hugs, but denied any incidents where one employee was trying to hurt another. He does not ever recall a time when management had to tell employees to stop screwing around.

⁴ Schnitker Depo., Ex. 1.

⁵ Baker Depo. at 10.

Donald Goertzen has worked for respondent for 23 years. At the time of the incident, he was on his computer when he heard a scuffle by the front door and Mr. Schnitker saying, "You mess with the bull, you get the horns." He then heard claimant saying something about his knee. Mr. Goertzen asked claimant, "Do you need me to take you to the hospital?" Mr. Goertzen indicated claimant then walked past him and went out the door.

Mr. Goertzen indicated there was some high fiving, chest bumping, stomach tickling and butt slapping, but it never got aggressive or mean-spirited. He stated if there was ever a heated argument between two employees, a meeting was called with the owner. He indicated if he sees a group of guys standing around, he will tell them to quit screwing around and get back to work. He denied ever seeing anything aggressive, any wrestling or any "grab assing [sic] situation,"⁶ and did not believe there was a written policy regarding touching somebody in an aggressive manner.

John Wentling has worked for respondent for 30 years. He believes all of respondent's employees are friends and there is no animosity. He was aware of the high fiving and butt slapping on the sales floor, but was unaware of any bear hugging. He stated that respondent does not have a written horseplay policy because it has never been an issue. Prior to November 16, 2012, he was not aware of any horseplay in which somebody got hurt. He was not aware of a time when management had to advise employees to stop screwing around and if it had occurred, it was handled before it ever got to his level. Mr. Wentling testified that Mr. Baker had no true supervisory capacity.

Judge Fuller denied benefits on the basis that claimant's injury was on account of voluntary horseplay. Claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501(a)(1)(E) states:

Compensation for an injury shall be disallowed if such injury to the employee results from the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

ANALYSIS

Claimant was engaged in horseplay. Under K.S.A. 2012 Supp. 44-501(a)(1)(E), he is not entitled to compensation.

⁶ Goertzen Depo. at 11-12.

Prior to May 15, 2011, Kansas did not have a statute addressing horseplay. Prior Kansas decisions, which were based on the common law and decided without the benefit of a statute concerning horseplay, generally indicated that horseplay injuries were not compensable unless horseplay was a regular incident of employment of which respondent was aware and allowed to continue.⁷ An unwilling or nonparticipating victim of horseplay would also receive compensation for a horseplay injury.⁸

Claimant and Mr. Schnitker were not involved in a fight. The facts of this case show claimant willingly engaged in horseplay. K.S.A. 2012 Supp. 44-501(a)(1)(E) precludes an order for compensation.

CONCLUSIONS

Under K.S.A. 2012 Supp. 44-501(a)(1)(E), claimant cannot receive compensation because his injury occurred as a result of voluntary horseplay.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated March 18, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

⁷ *Stuart v. Kansas City*, 102 Kan. 307, 310, 171 Pac. 913, *reh'g denied* 102 Kan. 563, 171 Pac. 913 (1918).

⁸ *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 388, 130 P.3d 111 (2006).

⁹ K.S.A. 44-534a.

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Honorable Pamela J. Fuller